D hereto, *infra*, p. 33a; and is not officially reported. The original Opinion of the Circuit Court of Appeals which reversed the District Court appears in Appendix C hereto, *infra*, p. 19a, and is not reported. The Opinion of the Circuit Court of Appeals reversing its original determination is not yet officially reported. Appears in Appendix A, *infra*, p. 1a.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

(1) Is General Order 44 of the Bankruptcy Act as promulgated by the Supreme Court of the United States applicable in Chapter XI proceedings so as to require attorneys for debtors not in possession, to obtain Court approval or appointment to entitle them to compensation for services rendered by them in such proceedings?

(2) Did the Circuit Court of Appeals below invade the exclusive province of the Supreme Court of the United States in extending the language, scope and effect of General Order 44 by applying same to attorneys for debtors not in possession under Chapter XI, and thus bring about a manifest injustice?

(3) Did the District Court, as a matter of law, have the power to award compensation to Petitioner?

Statutes Involved

The statutory provisions involved are Section 62 of the Bankruptcy Act, 11 U. S. C. §641; Section 328 of the Bankruptcy Act, 11 U. S. C. §728; Section 342 of the Bankruptcy Act, 11 U. S. C. §742; General Order 44 of the Supreme Court of the United States (28 U. S. C. §2075).

Statement

(1) On July 10, 1963, the Debtor filed a Petition for arrangement under Chapter XI in the United States District Court for the District of New Jersey. A Receiver was appointed for it and, in the course of the proceeding, Petitioner was retained by the Debtor to render certain specific services in aid of arrangement and to co-operate with its original counsel by rendering the required service.

(2) On November 14, 1963, after approval and on the eve of confirmation of the plan proposed under Chapter XI, stockholders moved to transfer to Chapter X from Chapter XI. The S.E.C. joined in that move. On December 12, 1963, removal was ordered under penalty of dismissal of the Chapter XI proceeding unless the Debtor filed a Voluntary Petition under Chapter X. It complied on March 17, 1964. Prior to the filing of the Chapter X petition all the services of Petitioner had been rendered, resulting in highly beneficial results through the reduction and elimination of substantial claims asserted against the Debtor. It has never been denied that these services were vital, necessary and fruitful. These benefits were passed on to and availed of by the Debtor in the ultimate plan as later confirmed under Chapter X.

(3) In due course, following confirmation of the Chapter X Plan of reorganization, Petitioner applied for an allowance for the services rendered by him in the Chapter XI proceedings which preceded the reorganization petition.

(4) The District Judge denied the application, holding:

(a) That under the provisions of General Order 44, of the Supreme Court of the United States, Petitioner was required to have obtained an Order appointing him as counsel to the Debtor before be-

coming entitled to an award of compensation for the services rendered by him; that failure to obtain such an Order constituted a bar to compensation.

(b) That there was a "relation back" under Section 328 of Chapter X of the Bankruptcy Act and, therefore, Petitioner was disentitled to compensation for the services rendered by him even though they were fully rendered in the prior Chapter XI proceedings.

(5) On appeal the Circuit Court of Appeals reversed on June 10, 1968 (see Opinion, R. 19a).

(6) The S.E.C. which originally joined with the Trustee-Respondent in resisting the allowance sought by Petitioner, reversed its position and advised the Court of Appeals that it favored a remand to the District Court (R. 20a).

(7) Following the reversal, the Trustee sought rehearing which was granted on the 10th day of July, 1968.

(8) On the second appeal, the Circuit Court of Appeals reversed again, upsetting its prior ruling (App. B, pp. 17a to 18a), by a divided Court. The reversal on the second appeal sustained the original conclusions of the District Judge. Appendix C, p. 1a.

(9) A further ground for the reversal was that the services which Petitioner had performed could and should have been performed by the Receiver, the Trustee and his attorneys (although they did not do so) and that strong policy considerations requires strict compliance with General Order 44, failing which, a bar to compensation arose (words in parentheses ours).

Reasons for Granting the Writ

(1) The subject matter of this Petition has now been considered by 12 Judges of both the District and Circuit Court of Appeals (excluding the Judges who granted rehearing). The Circuit Court of Appeals has indulged in two reversals with respect to the questions involved. As indicated, the first reversed the District Court, 2 Judges voting for reversal and 1 dissenting. After rehearing, it then reversed its original ruling and affirmed the District Court. The first dissenting Opinion of the Circuit Court of Appeals is now that of the majority on reversal on the last appeal. The last vote was 5 for reversal and 3 for affirmance. The Chief Judge of the Circuit Court of Appeals has consistently expressed views supporting Petitioner.

(2) The somersault in views clearly indicates that an area of grave perplexity and confusion exists. Diligent research fails to disclose that General Order 44 in the context here involved has ever heretofore been construed, or that any decision exists which furnishes even the remotest basis for the interpretation and application given to it by the Court below. Thus, there appears to be involved a case of first impression of distinct importance.

(3) In the strong dissenting Opinion of the Circuit Court of Appeals, the Chief Judge of the Third Circuit says (page 11, C. C. A. Opinion, filed March 13, 1969):

> "None of the cases cited above, and *none that research has discovered*, even suggests that court approval of the appointment of the debtor's counsel [in a Chapter XI proceeding] is a prerequisite to judicial approval of compensation measured by the value of the attorney's services to the estate." Appendix B, *infra*, p. 13a. (Italics ours.)

(4) The decision sought to be reviewed has created uncertainty on an issue important in the administration of the Bankruptcy Law which requires clarification by the Supreme Court of the United States. Attorneys representing future Debtors, as well as those presently under Chapter XI would be required under the decision to obtain Orders appointing them prior to rendering any service, in the absence of which they would be denied compensation. No such requirement has ever existed since the enactment of Chapter XI. Indeed, no such authority is given to the Judges of the Bankruptcy Court under the Statutes or General Orders to make such an Order. Manifestly, this serious and important question should be resolved in aid of the proper administration of the Bankruptcy Act, to guide the Bankruptcy Courts and the Bar, and to settle the law on the subject.

(5) Clearly, the question presented is of importance in the administration of the Federal Bankruptcy Law, Chapters X and XI and General Order 44, and concededly a substantial conflict in judicial opinions exists.

(6) Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in every pending and future Chapter XI proceeding where a Debtor is not continued in possession.

(7) The decision of the Court below is believed to be erroneous and not in accord with the plain language of General Order 44 and is basically in conflict with the philosophy of the following cases, cited in the dissenting Opinion:

In re Prudence, 2d Cir. 1938, 96 F. 2d 157;
Vermilion Bay Land Co. v. *Fitzgerald*, 6th Cir. 1946, 157 F. 2d 640;

Greensfelder v. *St. Louis Public Service Co.*, 8th Cir. 1940, 114 F. 2d 53, cert. denied *sub nom.*; *Stein* v. *St. Louis Public Service Co.*, 311 U. S. 714;
In re Ritz Carlton Hotel & Restaurant Co., D.N.J., 1945, 60 F. Supp. 861; see *In re McGann Mfg. Co.*, 3rd Cir. 1951, 188 F. 2d 110, 112;
Application of Pinetree Associates, E.D.N.Y. 1948, 77 F. Supp. 270.

(8) The General Orders have the full force of law.

Collier on Bankruptcy, 14th Ed., Vol. 4, page 2191, also Vol. 3, same edition, pages 1407-8. Cf. *Weil* v. *Neary*, 278 U. S. 160, 96 Sup. Ct. 160, 73 L. Ed. 243.

It was neither the duty nor privilege of the Court below to inferentially or directly impose a requirement, the inclusion of which operates to materially alter the General Order and thus bring about what is practically conceded to be an unjust or harsh result (cf. *Chengo Ho Mui* v. *Rinaldi*, 262 Fed. Supp. 258).

General Order 44 could not lawfully have been given any greater scope nor effect than its language permits and certainly not according to some unexpressed intention.

(9) The Circuit Court of Appeals by its decision has arrogated to itself a power distinctly reserved to this Court by changing General Order 44 in effect. Such a usurpation of power and authority has apparently no precedent so far as can be ascertained. To leave the error uncorrected, opens the door to the possible emasculation of every other General Order by similar action.

(10) The S.E.C., a governmental agency, intervened by leave of Court and originally shared the views of the

Trustee-Respondent. During the pendency of the original appeal, it advised the Circuit Court of Appeals that it had reconsidered and felt that its prior contentions were incorrect and urged a reversal and remand. The same position was maintained on the last appeal. Therefore, it is clear that the United States Government itself, through its Agency, is at odds with the decision below.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAX L. ROSENSTEIN,
Attorney for Petitioner.

APPENDIX A

Opinion on Rehearing in *Neiwirth, et al.* v. *Hydrocarbon Chemicals, Inc., et al.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16787 and 16788

In the Matter of

HYDROCARBON CHEMICALS, INC. and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKE HARBOR LAND COMPANY, INC., all New Jersey corporations, Debtors,

LEO NEIWIRTH, Esquire,

Appellant in No. 16787

SAMUEL S. STARR, Esquire, MEYER WEINBERG, Esquire, and EDWIN FRADKIN, Esquire,

Appellants in No. 16788.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued January 19, 1968 Reargued November 26, 1968

Before: HASTIE, *Chief Judge*, KALODNER, GANEY, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges*.

Appendix A

Opinion of the Court

(Filed—March 13, 1969.)

By Ganey, *Circuit Judge.*

The appellants here are claiming compensation for services allegedly beneficial to the bankrupt estate rendered as attorneys for the debtor. Robert Friedlander who, for reasons not relevant here, was denied all compensation in connection with the proceedings, filed a petition under Chapter XI and, as counsel for the debtor, employed Leo Nelwirth, Samuel S. Starr, Meyer Weinberg and Edwin Fradkin as his counsel in connection therewith. At the inception of the proceedings under Chapter XI, Harry A. Margolis was appointed receiver on the 10th day of July, 1963, and filed a bond in the sum of $100,000. Paragraph 8 of the order provides: "Said Receiver be and he is hereby authorized to operate the businesses and manage the property of said Debtors until the further order of the Court." Paragraph 9 thereof provides: "That without in any way limiting the generality of the foregoing, said Receiver shall have full power and authority under the further order of this Court . . . (g) . . . to do such other acts in the continuance of the business and preservation of same as he shall deem for the best interests of this estate and its creditors."

On the same day, July 10, 1963, the court empowered the receiver to retain the firm of Kleinberg, Moroney & Masterson as his attorneys. In the petition for their appointment, paragraph 3, "That he has selected the aforesaid firm of Kleinberg, Moroney & Masterson because said attorneys are known to him to be experienced and thor-

oughly competent to perform their duties as attorneys to your petitioner in the administration of the estate of the above named Debtors." In a petition dated July 19, 1963, in paragraph 3 thereof, "Said firm of Kleinberg, Moroney & Masterson did thereupon enter upon the performance of their duties as attorneys for your petitioner, but your petitioner subsequently ascertained that the intricacies and complexities of the corporate sructures and the affairs and transactions of the Debtors require that your petitioner be authorized to retain the services of an additional attorney so that he will have the benefit of Co-Attorneys in the within proceeding."

In paragraph 5, the petitioner stated, "That he has selected the aforesaid firms of Kleinberg, Moroney & Masterson and Crummy, Gibbons & O'Neill because said attorneys are known to him to be experienced and thoroughly competent to perform their duties as Attorneys to your petitioner in the administration of the estate of the above named Debtors." This order appointing additional counsel was entered on the 19th day of July, 1963.

On the 19th day of July, 1963, the receiver presented a petition to the court to appoint an accountant "to conduct certain audits and investigations in connection with the business of the debtor corporations, their books and records." and on that date, Pogash & Co. was appointed as accountant to assist in the preparation of their work. At no time during the Chapter XI proceeding did any of the appellants employed by counsel for the debtor, Robert Friedlander, receive the approval of the court even though, as has been indicated, the receiver had retained two firms as co-counsel for the receiver, as well as an accountant to aid in the proceedings.

After some five months of futile attempts to reorganize the situation under Chapter XI, all proceedings thereun-

der were abandoned and a petition to proceed solely under Chapter X was filed. The services which had been performed by the appellants, counsel to the counsel for the debtor, were in good part used in the Chapter X proceeding, although a trustee and counsel were likewise appointed under the Chapter X proceeding.

We would deny compensation on the ground alone that there is no provision in the Bankruptcy Act for paying more than one fee to counsel for the debtor, nor is there any provision in the Act for employment of other counsel for the counsel for the debtor unless he compensates them himself. Here, there was no necessity whatsoever for counsel for the debtor employing counsel without the approval of the court when he was not a debtor in possession and there was a receiver who, as has been indicated, employed as co-counsel two reputable firms of lawyers, as well as an accountant, and later a trustee was appointed with counsel, since the work performed by the counsel to the counsel for the debtor in connection with the proceedings was the work properly of counsel for such receiver and such trustee. The work of eliminating the tax lien here was clearly the work of the counsel for the receiver and his counsel under Chapter XI, as well as the work of the trustee and his counsel, since it was in aid of the proper administration of the estate, looking to its preservation and clearly within the powers of the receiver and trustee under the orders of the court.

Furthermore, counsel for the counsel for the debtor never secured court approval for their services allegedly beneficial to the estate in the Chapter X proceeding and at the close thereof, Starr, Weinberg and Fradkin, the appellants, presented their bill to the counsel for the debtor and

upon not being paid then presented their bill to the court for their services rendered. It seems that the appellants here were under the impression that they were to be paid by the counsel for the debtor since he presented a bill for $125,000 for his services and a scrutiny of the record shows that a far greater portion of the services performed were done by the appellants than by counsel for the debtor. In effect, during the Chapter X proceedings, the services which had been performed under the Chapter XI proceedings and were used in the Chapter X proceedings by the appellants, rendered them at least de facto counsel for the trustee and as such they were acting without the approval of the court, which is required under a Chapter X proceedings. This is most essential in order that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same. In so doing, they were, in effect, operating under General Order 44 Bankruptcy.[1] It is well-

---

[1] General Order 44 in Bankruptcy reads as follows:

APPOINTMENT OF ATTORNEYS

No attorney for receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters

(*Footnote continued on following page*)

settled that unless counsel have been approved by the court, though their services were of value to the court in a Chapter X proceeding, they must be denied compensation. This Court, speaking through Judge Maris, in *In re National Tool & Mfg. Co.*, 209 F. 2d 256, 257, stated as follows: "It is clear that General Order 44 applies to reorganization proceedings under Chapter X of the Bankruptcy Act. It is equally clear that Mr. Mode was not appointed as an attorney for the trustees of the debtor in the manner required by General Order 44. It is settled that under these circumstances an attorney may not be com-

---

(*Footnote continued from preceding page*)

upon which he is to be engaged, and that his employement would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

pensated out of the debtor's estate even though he may have rendered valuable services to the trustees. It follows that the district court was without authority to make the order appealed from." In *In re Progress Lektro Share Corp.*, 117 F. 2d 602, the court stated, in denying compensation to counsel: "There is no question but that the appellant acted throughout in good faith and a denial to him of compensation is a harsh conclusion. However, the law is unquestionably settled that the order of the district court was correct." *Gochenour* v. *Cleveland Terminals Building Co.*, 142 F. 2d 991, 993, cert. denied 323 U. S. 767; *Albers* v. *Dickinson*, 127 F. 2d 957; *Butcher* v. *Leavenworth State Bank*, 184 F. 2d 498; *In re Pedisick*, 103 F. Supp. 199; *In re Robertson*, 4 F. 2d 238 (3rd Cir.).

That the gaining of the necessary approval of the court was a requisite, there can be no doubt, since the final sentence of Section 328 of the Bankruptcy Act, 11 U. S. C., states: "Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 132 of this Act, such amended petition or creditors' petition shall thereafter, *for all purposes of Chapter X of this Act*, be deemed to have been originally filed under this chapter." (Emphasis supplied.) It is obvious that the language of this section is explicit, plain and unambiguous and the appellants, experienced attorneys, as attorneys for the debtor, knowing that the matter was in a Chapter X proceeding, should have in this proceeding likewise sought the approval of the court for the services which were to be utilized as the basis for the plan to be approved under Chapter X since their fees were to come out of the fund realized under the Chapter X proceeding.

Appendix A

It cannot be stressed too strongly here that, while the result reached is, as has been indicated above, "a harsh conclusion", nevertheless, counsel who have performed services, especially under Chapter X of this proceeding, should seek the approval of the court for otherwise, as counsel for the debtor, the court has no control whatsoever over them and it is imperative that their competency, experience and integrity therefor have the approbation of the court. Cf. *United States* v. *Larchwood Gardens,* December 12, 1968, 3rd Circuit, Nos. 16,886 and 16,887.

The judgment of the lower court will be affirmed.

Judge Van Dusen concurs in the foregoing opinion.

FREEDMAN, *Circuit Judge,* concurring.

I join in the affirmance of the judgment of the district court.

At the rehearing before us it was agreed that the services rendered by appellants consisted of the settlement of claims of creditors and the removal of the government's jeopardy assessment. These were clearly among the duties of the receiver which should have been performed by him and his attorneys.

The allowance of fees to counsel for the debtor in such circumstances would subvert the phophylactic purpose of General Order 44. A debtor out of possession usually has an attorney, but in my view the receiver and his attorney may not by abdicating their function open the door to its performance by the debtor's attorney whose appointment was not approved by the court. If the benefit to the estate is made the decisive test, it will inevitably encourage the

receiver and his court-approved attorney to slacken in their duty, knowing that someone else will perform it for them.

I believe that the relevant portions of the Bankruptcy Act and the policy underlying General Order 44, which are discussed in the comprehensive opinion of Judge Ganey, forbid compensation to an attorney for a debtor out of possession where a receiver and his court-approved counsel have had conferred upon them the full authority to perform those services, even though they permit them to be performed instead by the attorney for the debtor.

I therefore join in the affirmance of the judgment of the district court holding that it had no power to award compensation to the debtor's attorneys even though their services benefited the estate.

SEITZ, *Circuit Judge*, concurring.

I would affirm the judgment of the district court but based on a different approach.

The order appointing the receiver in the Chapter XI proceedings vested him with possession of the assets and full administrative power. Indeed, it explicitly provided that he was not to be a "mere Custodian". See §48(a)(2) of the Bankruptcy Act (11 U. S. C. A. §76(a)(2); see also §2-(a)(3) of the Act (11 U. S. C. A. §11(a)(3)). Subsequent orders of the referee appointed two sets of attorneys to represent the receiver generally. Accountants were also appointed by order of the referee.

The effect of these orders was not only to give to the receiver full control of the operation and administration of the debtor corporation under Chapter XI but also to

provide him with the necessary legal and accounting assistance to discharge his duties. These duties would certainly include examining and settling creditors' claims and negotiating the removal of the government's jeopardy assessment, which were the services allegedly performed by these appellants. Thus, the appellants necessarily performed the alleged services for the benefit of the receivership estate and not for the debtor out of possession. General Order 44 requires, inter alia, court appointment of attorneys who do work for the receiver. The employment of appellants was admittedly not authorized by the court. Therefore, appellants were not entitled to be compensated from the estate for failure to comply with General Order 44.

I recognize that the result is harsh, but necessary if the strong policy considerations underlying the requirement of strict compliance with General Order 44 are to be implemented. A similar result in a Chapter X context, for failure to comply with the order was reached by this court in In re Nat'l. Tool & Mfg. Co., 209 F. 2d 256 (1954). The rationale of that case seems equally applicable in a Chapter XI context under the circumstances of this case.

I find it unnecessary to consider the correctness of the position advanced by the S. E. C. that where the powers of the Receiver are vague, the attorney for a debtor out of possession may be compensated for non-duplicative work done in the undefined area. I say this because a reading of the referee's orders makes it clear that rather than being vague the receiver's powers fully encompassed the area of service for which appellants seek compensation.

Judge Van Dusen concurs in the foregoing opinion.

Appendix A

HASTIE, *Chief Judge,* with whom ALDISERT and STAHL, *Circuit Judges,* join, dissenting.

In controversy here are applications for compensation made in a reorganization proceeding under Chapter X of the Bankruptcy Act for services rendered by attorneys during a preceding Chapter XI proceeding. The economic benefit of the services is said to have been realized by the bankrupt state in the Chapter X reorganization, but the district court concluded as a matter of law that it lacked authority to allow the requested compensation. Thus the question now presented is not whether in the exercise of equitable discretion the court should or probably would have awarded compensation but merely whether it had power to do so.

In the Chapter XI proceeding the court had appointed a receiver who, with the court's approval, had retained attorneys. Thereafter, the claimants were retained by the debtor's attorney to render special legal services designed to facilitate the proposed arrangement. Pending discussion of the point later in this opinion, it will be assumed that for purposes of compensation the claimants became and should be treated as attorneys for the debtor.

It is the position of a majority of this court that the fact that the employment of the claimants was not authorized by the bankruptcy court made it unlawful for that court to award them any compensation out of the debtor's estate. With that conclusion I disagree.

Undergirding the majority position is the provision of General Order 44 in Bankruptcy, admittedly applicable to Chapter X, that "no attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court." But on its face this provision does not

cover an attorney for a debtor who is not in possession. See 8 COLLIER, BANKRUPTCY, 14th ed. 1966, 716. And there is no valid reason that it should. General Order 44 is designed to enable a bankruptcy court to prevent court officers who are administering an insolvent estate from burdening the estate with compensation of unneeded professional personnel. See *Wiggett* v. *D'Andria*, 1st Cir. 1957, 241 F. 2d 680, 682. This control is needed because an attorney for a trustee, receiver or debtor in possession is entitled to reasonable compensation for work he is authorized to perform in due course of the administration of the estate, even though the estate has not been enriched by his services.

In contrast, a debtor not in possession does not function as an officer of the court, and neither does his attorney. The court is not concerned with and has no authority over the debtor's appointment of counsel as in his view his situation may require. At the same time the work of such counsel may materially benefit the estate and to that extent only may be and, on proper petition, normally is compensated from the estate. *In re Prudence*, 2d Cir. 1938, 96 F. 2d 157; *Vermilion Bay Land Co.* v. *Fitzgerald*, 6th Cir. 1946, 157 F. 2d 640; *Greensfelder* v. *St. Louis Public Service Co.*, 8th Cir. 1940, 114 F. 2d 53, cert. denied sub nom. *Stein* v. *St. Louis Public Service Co.*, 311 U. S. 714; *In re Ritz Carlton Hotel & Restaurant Co.*, D. N. J. 1945, 60 F. Supp. 861; see *In re McGann Mfg. Co.*, 3d Cir. 1951, 188 F. 2d 110, 112. Indeed, for Chapter X proceedings section 241 of the Bankruptcy Act, 11 U.S.C. §641, expressly authorizes compensation for attorneys for debtors. And though Chapter XI itself contains no comparable provision, the general provisions of section 62, 11 U.S.C. §102, apply and authorize the compensation of a debtor's attorney in a Chapter XI arrangement. *Appli-*

cation of Pinetree Associates, E. D. N. Y. 1948, 77 F. Supp. 270.

None of the cases cited above, and none that research has discovered, even suggests that court approval of the appointment of the debtor's counsel is prerequisite to judicial approval of compensation measured by the value of the attorney's services to the estate. Indeed, in some cases compensation includes the value to the estate of services rendered by the attorney for the debtor even before the court acquired jurisdiction through the filing of a Chapter X or Chapter XI proceeding. *In re Prudence, supra; Stein* v. *Henker*, 8th Cir. 1946, 157 F. 2d 740.

The foregoing considerations lead to the conclusion that a bankruptcy court in a Chapter X reorganization has ample power to compensate a debtor's attorney, who has been retained and has served without judicial authorization, for services rendered in connection with a preceding Chapter XI proceeding with value redounding to the estate in the Chapter X reorganization.

Heretofore, it has merely been assumed that legal power to compensate the attorney for the debtor includes power to pay for services actually rendered by attorneys retained in the debtor's interest by the attorney for the debtor. Since the determinant of power to compensate the debtor's attorney is the value of services to the estate, it would be technicality without justifying purpose to deny such power with reference to similarly valuable work performed by assisting counsel. Moreover, in this case any technical requirement seems to be satisfied and any danger of duplicating claims minimized by the filing of the claims of the appellants through the attorney for the debtor and in conjunction with his own claim. The one case that has been found in which a court considered

such a situation resulted in the allowance of compensation for the assisting attorney in the present appellant's position. *Application of Pinetree Associates, supra.*

It remains to consider the contention advanced in the concurring opinion that the receiver's authority was broad enough so that he, through his own court approved attorney, might have rendered the services which the present claimants performed at the behest of the debtor. Therefore, it is argued, the present claimants should be treated as intermeddling volunteers, denied any judicial award of compensation out of the debtor's estate, and thus discouraged from exercising such initiative as this case disclosed.

I disagree with this reasoning because I think it does not sufficiently take into account significant differences between an ordinary bankruptcy, administered by a court-appointed trustee, and a debtor proposed Chapter XI arrangement in which a receiver has been appointed.

When ordinary bankruptcy is decreed, the bankrupt's estate is irretrievably lost to him and all that remains to be done is the disposal and distribution of his assets for the benefit of creditors. He has no responsibility for and no active role in this essentially judicial function. But in a Chapter XI arrangement petition an embarrassed debtor is asking the court's assistance in his efforts so to rearrange his affairs that he will salvage some significant part of his estate while making acceptable provision for his creditors. Even though custody of the debtor's assets and the management of his business may temporarily be entrusted to a receiver during the pendency of the arrangement proceeding, the debtor's continuing activity and initiative are contemplated and required if the arrange-

ment he has proposed is to succeed. Ordinarily, he participates actively in making his proposals workable and acceptable to creditors. Indeed, negotiations with creditors are not likely to succeed without his initiative and active participation. If the plan must be revised, it is his responsibility to do so. If new financing must be obtained, he usually must seek it. If particular impediments to creditor acceptance can be removed or surmounted, he may properly try to accomplish this result.

Much of a debtor's activity in shaping and reshaping a plan and in removing impediments to its acceptance by creditors is lawyer's work properly entrusted to the debtor's attorney. This case presents a good example. A jeopardy tax assessment in the amount of $1,250,000.00 had been levied by the United States against the debtor. Believing that this assessment was not justified, the attorney for the debtor retained a firm of tax law experts, one of the present claimants, to attempt to remove this obviously serious impediment to any acceptable arrangement. This effort was notably successful, resulting in a removal of the jeopardy assessment and a reduction of the government's tax claim to $37,026.10.

The other attorney who is an appellant here, also acting pursuant to employment by the debtor's attorney, claims to have succeeded in reducing or eliminating some 600 claims against the debtor. Again, such improvement of the debtor's financial situation was an appropriate way of aiding the debtor's effort to accomplish an arrangement acceptable to creditors.

It is recognized that, while the debtor had a vital interest in thus facilitating his proposed arrangement, the elimination of claims is also a legitimate concern to the receiver in his temporary management and administration

of the estate pending arrangement. We do not know why the receiver took no initiative in these matters in this case. We do know that the debtor was properly concerned to eliminate or reduce claims, the existence of which necessarily made an arrangement more difficult. On the present record, it cannot properly be decided that the debtor was an intermeddler in his successful initiative exercised through the present lawyer claimants. On an examination of all of the relevant circumstances, the district court might well conclude that the debtor's action was proper and of such value to the estate that the attorneys who did the work should be compensated out of the estate. It is also possible that there were circumstances which would justify a contrary result. But, in my view, that determination should be made by the district court in the exercise of equitable power and discretion.

Finally, the concurring opinion takes the position that this case is like *In re Tool & Mfg. Co.*, 3d Cir. 1954, 209 F. 2d 256. But in that case compensation was sought by a Chapter X trustee's attorney whose appointment had not been approved by the court. That appointment violated the express mandate of General Order 44. It has been explained earlier in this opinion that General Order 44 does not cover the attorney for the debtor not in possession and that the court should not extend the requirement of court approval beyond the Order's terms to the appointment of the debtor's attorney.

For these reasons I would vacate the order of the district court and remand the cause with instructions to consider and adjudicate the appellants' claims on their merits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Order Vacating Judgment of U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16,787 AND 16,788

In the Matter of HYDROCARBON CHEMICALS, INC. and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations, Debtors,

LEO NEIWIRTH, ESQUIRE,

Appellant in No. 16,787.

SAMUEL S. STARR, ESQUIRE, MEYER WEINBERG, ESQUIRE and EDWIN FRADKIN, ESQUIRE,

Appellants in No. 16,788.

(D. C. Bankruptcy No. 73-63)

Present:

HASTIE, *Chief Judge*, and KALODNER, GANEY, FREEDMAN, GEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges.*

In accordance with the opinion of the Court on Rehearing filed this day,

Appendix B

It is ORDERED that the judgment of this Court filed June 10, 1968, in the above-entitled cases be and the same is hereby vacated.

By the Court,

KALODNER,
Circuit Judge

Dated: March 13, 1969.

APPENDIX C

Opinion of U. S. Court of Appeals for the Third Circuit in re: *Neiwirth, et al., Hydrocarbon Chemicals, Inc., et al.*

(Filed—June 10, 1968)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16787 & 16788

IN THE MATTER OF

HYDROCARBON CHEMICALS, INC and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey Corporations, Debtors,

LEO NEIWIRTH, ESQUIRE,

Appellant in No. 16787

SAMUEL S. STARR, ESQUIRE, MEYER WEINBERG, ESQUIRE, and EDWIN FRADKIN, ESQUIRE

Appellants in No. 16788

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix C

Argued January 19, 1968

Before HASTIE, *Chief Judge*, GANEY, *Circuit Judge*, and WEINER, *District Judge*

By WEINER, *District Judge*

At issue here is the propriety of the applications made by appellants Leo Neiwirth, Esq., and Starr, Weinberg & Fradkin, Esqs. (hereinafter, "Fradkin") to the district court below for allowances for legal services performed while appellants were working for the debtor corporation, Hydrocarbon Chemicals, Inc. The work was done for the debtor during the time it was in arrangement proceedings under Chapter XI of the Bankruptcy Act, prior to the transfer to corporate reorganization proceedings under Chapter X.

Appellants ask for what they claim is reasonable compensation for fruitful services rendered as attorneys for the debtor and allegedly benefitting the estate. Appellee-trustee contends, however, that General Order 44 renders any compensation to appellants contingent upon their having received prior authorization from the court in their appointment.

The district court below approved this argument. On this appeal, appellants advance the view that prior court approval was not prerequisite here for them to look directly to the estate for their compensation. Upon reconsidering the matter, appellee Securities and Exchange Commission has reversed the position it took in the proceedings below, and now agrees with appellants. On this dispute, therefore, issue is joined.

Appendix C

General Order 44 was promulgated by the Supreme Court under the authority conferred, prior to October 3, 1964, by §30 of the Bankruptcy Act, 11 U.S.C. §53 (repealed); *cf.* 28 U.S.C.§2075. Like all the General Orders in bankruptcy, General Order 44 has the force and effect of law, 2 Collier, Bankruptcy ¶30.02 (14th ed. 1966). It provides, in pertinent part, that "[n]o attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court . . ." 11 F.C.A. App. at 534; 4A Collier, Bankruptcy at 1543 (14th ed. 1967).

The debtor corporation, for whom appellants were performing their services, was admittedly none of the parties enumerated in the statute. In particular, since during the Chapter XI arrangement proceedings there was a receiver appointed, the debtor corporation was not then a "debtor in possession", see §342 of the Bankruptcy Act, 11 U.S.C. §742. In such a situation, we are cautioned, "[c]areful distinction must be drawn between a debtor and a debtor in possession," 8 Collier, Bankruptcy ¶6.30, at 949 *et seq.* (14th ed. 1966). Furthermore, the treatise notes, "General Order 44 does not apply to an attorney for a debtor not in possession . . ." *Id.* ¶5.34 (2.6), at 716.

To overcome this obstacle, appellee-trustee asserts that §328 of the Bankruptcy Act, 11 U.S.C. §728, renders General Order 44 applicable through its provision relating the later Chapter X proceeding back to the date of filing the initial Chapter XI arrangement. Section 328 was newly added to the general scheme of the Chandler Act on July 7, 1952. It provides for the transfer of proceedings from Chapter XI to Chapter X in appropriate cases, wherein the judge may, upon application of the S.E.C. or any party in interest, enter an order dismissing the Chapter XI arrangement unless, within a time set by the judge,

the petition be amended to comply with the requirements of Chapter X. Specifically, the section concludes, in pertinent part: "Upon the filing of such amended position, . . . [the] petition . . . shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter." This is the language urged by appellee-trustee as bringing into play the prior authorization required by General Order 44, thus allegedly prohibiting compensation for appellants' services because of their fatal non-compliance with this requirement.

Appellee-trustee advances his conclusion as the third step of a syllogism. In the first place, §328 is urged as constructively transforming ex post facto the dual proceedings which had their abortive birth under Chapter XI into an effectively single Chapter X bankruptcy proceeding. Secondly, this argument continues, in a Chapter X reorganization the trustees have the exclusive statutory duty to "examine all proofs of claim and object to the allowance of such claims as may be improper . . ." §47a (8) of the Bankruptcy Act, 11 U.S.C. §75(a)(8). Hence, this reasoning concludes, appellants' services were within the scope of what the trustees appointed in the Chapter X proceeding had the duty to perform, and therefore appellants were, in function at least, unauthorized attorneys for the trustees.

Such an argument must necessarily stand or fall on its major premise. The legislative history of §328 shows simply that it was intended as a means of transition from Chapter XI to Chapter X proceedings fairly symmetrical in effect to §147 of the Bankruptcy Act, 11 U.S.C. §547, which provides for the converse transfer, H.R. Rep. No. 2320, 82d Cong., 2d Sess., in 2 U.S. Code Cong. & Ad. News 1979-80 (1952). The provision effecting a relation

back appears particularly aimed at remedying the evil encountered in *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434 (1940). There, in the words of the House Committee Report, "the petition under chapter XI was dismissed after the proceeding had been running for many months and a proceeding had to be started anew under chapter X," 2 U. S. Code Cong. & Ad. News 1980 (1952).

Congressional attention appears to have been focused upon sparing petitioners the useless agony of needlessly duplicating work already accomplished under an aborted Chapter XI proceeding in the subsequent Chapter X reorganization. It does not seem to have been the purpose of Congress to place contingencies, after the fact, upon the compensation for services performed in good faith under Chapter XI which would otherwise have applied only, with forewarning, to situations originating under Chapter X.

In view of the dearth of pertinent judicial commentary on this amendment of recent vintage, and mindful of the fact that "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction," *Bank of Marin* v. *England*, 385 U. S. 99, 103 (1966); Bankruptcy Act §2a, 11 U.S.C. §11(a), we cannot construe §328, together with General Order 44, to import the requirement of prior court authorization in a Chapter XI arrangement where General Order 44 does not in terms apply, merely on the grounds of a subsequent transfer to Chapter X proceedings which "shall thereafter, for all purposes of chapter 10 of this title [11], be deemed to have been originally filed under such chapter," in the words of §328 of the Bankruptcy Act, 11 U.S.C. §728. To extend the reach of General Order 44 to attorneys be-

yond its express terms on the strength of subsequently appointed trustees hypothetically deemed to have occupied the field from the commencement of the earlier Chapter XI arrangement would do violence both to the manifest intention of Congress and to the enacted language of the positive statutory law. We find no authority for such a tortured construction.

There is a further controversy over whether appellants' services were such as should properly have been rendered by the attorney for the receiver appointed in the Chapter XI proceedings. Were this in fact true, then General Order 44 would logically apply to bar compensation for anyone performing services properly within the scope reserved to the receiver's attorney unless prior court approval had been obtained for the attorney so acting, *cf. In re Progress Lektro Shave Corp.*, 117 F. 2d 602, 604 (2d Cir. 1941); *In re Porto Rican American Tobacco Co.*, 117 F. 2d 599, 602 (2d Cir. 1941). *See also In re National Tool & Mfg. Co.*, 209 F. 2d 256, 257 (3d Cir. 1954). Since this issue was not resolved by the district court below, on remand that court should address itself to this question. In so doing, the district court is of course free to use its considered discretion in assessing the propriety and amount of any allowance awarded, as a consideration de novo of these issues, in conformity with the matters decided on this appeal and hence foreclosed.

Several ancillary points remain for discussion. Appellants pursue their request for allowances, *inter alia*, under §241(4) of the Bankruptcy Act, 11 U.S.C. §641(4), which provides, in pertinent part:

> The judge may allow . . . reasonable compensation for services rendered and reimbursement for proper

costs and expenses incurred in a proceeding under this chapter [X]—

* * *

(4) by the attorney for the debtor . . .

Appellee-trustee argues that "*the* attorney" in the singular precludes allowances for more than one attorney's services. It is true, of course, that duplicative fees may not be awarded several attorneys who perform the work for which only one attorney is needed, *In re Hudson & Manhattan R.R.*, 224 F. Supp. 815, 831 (S. D. N. Y. 1963), *modified*, 339 F. 2d 114 (2d Cir. 1964); 3 Collier, Bankruptcy ¶62.12[8] (14th ed. 1967). But there is no logical reason to preclude the district court from directly compensating several attorneys for the debtor where they each performed distinct services of benefit to the estate. Moreover, §1 of the Bankruptcy Act provides a pertinent canon of construction:

> (35) Words importing the singular number may be applied to mean several persons or things.

11 U.S.C. §1(35).

Appellants may have been retained by the attorney for the debtor, and not by the debtor directly himself. Nonetheless, if the debtor's attorney had authority as an agent to hire assistants; and so long as appellants' services were in the furtherance of debtor's bankruptcy proceedings, benefitted the estate, and were nonduplicative of the work of any other attorney or officer; then we can see no good reason why the chain of their employment, without more would vitiate the propriety of their claim to allowances. *See generally* 3 Collier, Bankruptcy ¶62.10 (14th ed. 1967): "Allowance to Assistants Directly".

Appendix C

As a related final guideline; it would seem here appropriate to emphasize that, if on remand appellants would otherwise be entitled to look directly to the estate for compensation, they should not be precluded from so doing by reason solely of infirmities relating only to the attorney for the debtor, such as insider trading by the latter in the debtor's securities. See the connected appeal of Robert Friedlander, Esq., No. 16789. It would be an altogether different matter, of course, were appellants found to have participated in such infirmities, as does not appear to be the case from the record before us.

Since all parties to this appeal agree that a remand would be necessary to determine the value of appellants' services, and since application for allowances and disbursements was originally made to the district court below, we think a determination by that court of this issue, in the light of our decision here, is properly in order.

The judgment of the district court will be reversed and the cases remanded for proceedings not inconsistent with this opinion.

GANEY, *Circuit Judge*, dissenting.

I dissent.

It cannot be too strongly stressed that the appellants here, Leo Neiwirth, Samuel S. Starr, Meyer Weinberg and Edwin Fradkin, were merely employees of the counsel for the debtor of record, Robert Friedlander, in a Chapter XI proceeding, and are here seeking compensation under a Chapter X proceeding. Robert Friedlander, counsel for the debtor, this day was denied all compensation in connection with his services under the Chapter XI proceed-

ing for an impropriety occasioned during his tenure as counsel for the debtor under the Chapter XI proceeding.

At the inception of the proceedings under Chapter XI, Harry A. Margolis, Esq., had been appointed receiver therein and later as special counsel for the attorney for the trustee in the Chapter X proceeding.

As counsel for the debtor, Robert Friedlander, employed the appellants without ever consulting the receiver in the proceedings and, therefore, not with the approval of the court. I would deny compensation on this ground alone as there is no provision in the Bankruptcy Act, for paying more than one fee to counsel for the debtor, though he may distribute it as he likes, to those whom he employs, nor is there any provision in the Act for employment of other counsel by the counsel for the debtor unless he compensates them himself. This is most lucidly pointed up in the opinion of the trial court in denying compensation to the appellants. "General Order 44 is exhaustive, since it covers all three possible situations under which proceedings may take place: receivership, trusteeship, and the debtor left in possession. In the case of receivership, the attorney for the debtor has no independent authority to hire others as retainees of the Court. If they are necessary, he must convince the receiver who then may obtain authorization for their services. Of course the attorney for the debtor may still be entitled to compensation in appropriate circumstances, but his employees are solely his assistants who must share whatever compensation he received or look to other agreements with him." This, of course, must be so inasmuch as while counsel for the debtor need not be approved by the court in a bankruptcy proceeding, he cannot saddle the estate with the additional expenses of one, two or three assistants whom he employs without the approval of the court.

Appendix C

The second basis for my denial of compensation to the attorneys for the attorney to the debtor is that after some five months of futile attempts to reorganize the situation under Chapter XI, all proceedings thereunder were consigned to the limbo of unrequited hopes and the petition was amended to proceed solely under Chapter X. The appellants now seek recompense solely from the fund created by reason of the reorganization in the Chapter X proceeding.

These appellants were not neophytes, nor inexperienced individuals, as brought out in argument, but were mature, experienced counsel wise in the ways of bankruptcy and they surely must have known that their services under Chapter XI were to be of value to the estate in the Chapter X proceeding. Every propriety pointed to the fact that they should have gone to the court at the commencement of the Chapter X proceedings and at that time secured the approval of the court for some of the services they had performed under Chapter XI were now to be utilized by the trustee in the reorganization under Chapter X and, in its utilization by the trustee they were in effect of counsel then to the trustee and therefore subject to court approval under General Order 44 in Bankruptcy,[1] as to their

---

[1] General Order 44 in Bankruptcy reads as follows:

APPOINTMENT OF ATTORNEYS

No attorney for receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing

(*Footnote continued on following page*)

integrity, competence and fitness to act on behalf of the estate in the Chapter X proceeding. It is well-settled law that unless counsel have been approved by the court, though their services were of value to the court in a Chapter X proceeding, they must be denied compensation. In *In Re Progress Lektro Share Corp.*, 117 F. 2d 602, the court stated, in denying compensation: "There is no ques-

---

(Footnote continued from preceding page)

counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employement would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

tion but that the appellant acted throughout in good faith and a denial to him of compensation is a harsh conclusion. However, the law is unquestionably settled that the order of the district court was correct." *Gochenour* v. *Cleveland Terminals Building Co.*, 142 F. 2d 991, 993; *Albers* v. *Dickinson*, 127 F. 2d 957; *Butcher* v. *Leavenworth State Bank*, 184 F. 2d 498; *In Re Pedeisich*, 103 F. Supp. 199; *In Re Robertson*, 4 F. 2d 238 (3rd Cir.).

That this was requisite, there can be no doubt, since the final sentence of Section 328 of the Bankruptcy Act, 11 U.S.C., states: "Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 132 of this Act, such amended petition or creditors' petition shall thereafter, *for all purposes of Chapter X of this Act*, be deemed to have been originally filed under this chapter." (Emphasis supplied.) There are no steps necessary "to syllogize" nor is there any tortious reasoning in the relation back doctrine as the language of this section is explicit, plain and unambiguous and these experienced attorneys for the attorney for the debtor, knowing now that the matter was in a Chapter X proceeding, should have sought the approval of the court for the services which were to be utilized as the basis for the plan to be approved under Chapter X.

It is most difficult to understand why the appellants, as attorneys for the debtor, waited until the conclusion of the Chapter X proceedings to ask for compensation from the estate without having ever gained any court approval previously for their appointments by the attorney for the debtor, unless they discovered that they would not be paid by the attorney for the debtor. However, some key to its understanding may be found in the fact that Starr, Wein-

berg and Fradkin presented their bill for services rendered to counsel for the debtor, to him, Robert Friedlander, and, while the record does not disclose they were ever paid, it is reasonable to assume they were not, and, finding that the attorney for the debtor was so inclined, filed their claim against the estate. Again it is not too great an inference to draw that he expected to pay them when he finally filed a bill for $125,000 for his services under Chapter XI, as, from my interpretation of the record, these attorneys for him performed a major portion of the services rendered by him as attorney for the debtor. He also asked $25,000 for his services under Chapter X.

The vice in the majority opinion in condoning the conduct of the appellants in not seeking court approval of their position under Chapter X, is that if these services are to be left, as now suggested, for determination by the lower court as to their value, if any, to the estate under Chapter X, the whole gamut of their conduct from the filing of the petition under Chapter XI until its ultimate discharge under Chapter X is left without the court having any control whatsoever concerning their integrity or competence. If this course of proceeding has the stamp of authority of this court, it may well be that in the future unscrupulous counsel, in the transition to the completion of the estate, might do irreparable harm to it, having no sense of responsibility to the court whatsoever, as they were strangers in the proceedings and had no such status before the court as the attorney for the debtor had, since he was of record in the proceeding.

In my judgment, there broods over the circumstances of this case an aura of irregularity which this court should never lend sanction to.

Appendix C

I would affirm the judgment of the lower court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX D

Opinion of District Judge Coolahan

(Filed—May 17, 1967.)

II.

LEO NEIWIRTH and STARR, WEINBERG & FRADKIN.

The applications of Leo Neiwirth, Esq., and of Starr, Weinberg & Fradkin, Esqs., can be treated together since the same analysis governs each. Their respective applications state that Neiwirth and the firm were both retained by Robert S. Friedlander, Esq., to assist him in his capacity as attorney for the debtors. Neiwirth seeks $15,000.00, Starr, Weinberg & Fradkin seek $5,000.00.

There is no representation that the retention of either the firm of Mr. Neiwirth was sanctioned by order of the court pursuant to General Bankruptcy Order 44. In fact, Starr, Weinberg & Fradkin originally sent their bill for services to Mr. Friedlander himself. The Court believes this was the correct procedure, since neither that firm nor Neiwirth are entitled to any compensation from this Court on account of their failure to comply with the requirement of General Order 44.

Neiwirth claimed a total of 750 hours work in determining validity and priority of various claims. Starr, Weinberg & Fradkin also worked on the claims and allege to have removed a jeopardy filed against the estate by the United States. While I have some reservations about the extent and value of these services, it is unnecessary to evaluate them. It is true, as petitioner Neiwirth claims, that the attorney for the debtor may hire whatever assistants he desires; the point is that unless the court

approves this added burden, the assistants must look to him not only for their employment but for their fee. General Order 44 is exhaustive, since it covers all three possible situations under which proceedings may take place: receivership trusteeship, and the debtor left in possession. In the case of receivership, the attorney for the debtor has no independent authority to hire others as retainees of the Court. If they are necessary, he must convince the receiver who then may obtain authorization for their services. Of course, the attorney for the debtor may still be entitled to compensation in appropriate circumstances, but his employees are solely his assistants who must share whatever compensation he received or look to other agreements with him.